

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. _____

M.B.J. and J.P.J.,

Petitioners,

v.

THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT,
DEPARTMENT 2, THE HONORABLE
ROBERT L. DESCHAMPS III,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Fourth Judicial District Court, Missoula County
Cause No. DA-09-10

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Issues Presented for Review

1. May a writ of supervisory control be issued in this case?
2. Can the District Court require personal service of notice of termination and adoption proceedings upon a person who is neither a putative father nor a presumptive father when such service is not required by the 1997 Montana Adoption Act and such service violates the birth mother's right to privacy?

Summary of Argument

Petitioners M.B.J. and J.P.J. ("Petitioners") are the prospective adoptive parents of a child directly placed with them by the child's birth mother. The District Court insists that the birth mother identify the birth father and that he be personally served with notice of the adoption proceedings. *Order*, Nov. 6, 2009, Exhibit C; *Order*, Dec. 1, 2009, Exhibit D. Personal service is not required by the 1997 Montana Adoption Act because no person has registered with the Putative Father Registry as a putative father, no person claims to have attempted to establish a relationship with the child, or to have supported the child. The District Court's insistence upon personal service of notice upon an unidentified birth father violates public policy articulated by the 1997 Montana Legislature, the birth mother's statutory right to privacy, the child's right to stability, and all parties' right to expediency and finality in this proceeding.

Factual Background

The child was born in February, 2009 at Great Falls, Montana. The birth mother immediately placed the child directly with the Petitioners, intending that they adopt the child. In March, 2009 the Petitioners started direct placement adoption proceedings in the case below. Pre-placement and post-placement home studies found the Petitioners to be fit adoptive parents and recommended completion of the child's adoption by Petitioners.

The birth mother is a tribal member living off her tribe's reservation. The Indian Child Welfare Act requires that the birth mother's relinquishment of parental rights and consent to adoption be made before a tribal or state district court judge. The relinquishment is only final at the time of adoption. 25 U.S.C. § 1913(c). The relinquishment and consent hearing was held on September 29, 2009. At that hearing, Judge Deschamps made known his disapproval of the Putative Father Registry and the 1997 Montana Adoption Act.

A comment in the birth mother's counseling report (Counseling Services Report, Mar. 20, 2009, Exhibit 4 to *Petition for Adoption*, p. 1, ¶ 5), "[The birth mother] has chosen not to reveal the name of the father of the baby," apparently led to the following interrogation of the birth mother at the relinquishment hearing:

Q [By the Court] In your petition, you say you don't know who the father is. Is that true, you don't know who the father is?

A [By the birth mother] Um –

Q The biological father?

A Well, kinda. Well, I do know but –

Q You do know? Is it [the birth mother's estranged husband] –

A No.

Q – or is it somebody else?

Well, let's talk about [the birth mother's estranged husband], first. Is he an enrolled member of any Indian tribe?

A No.

Q How about the – this other person that you haven't named but that you think is the biological father of [the minor child]; is he an enrolled member –

A No.

Q -- of any tribe? is he a descendant?

A No.

Q Does he even know about this?

A Um, I'm not –

Q Pardon?

A I'm not exactly sure if he does or not.

Q Does he know that he had gotten you pregnant?

A Not that I know of.

Q So you haven't really had any communication with him about any of this?

A (Witness shakes head.)

Q What kind of problems is it going to create if somebody goes to him and says, Hey, you're the father of this child?

A Um, probably none because –

Q Pardon?

A None.

(Trans., Sept. 29, 2009, 12:6 – 13:15, Exhibit A)

Following this testimony, Judge Deschamps expressed his concern that the

1997 Adoption Act requires the potential father to register with the Putative Father Registry to preserve his parental rights. Trans., Sept. 29, 2009, 16:8 – 17:10, Exhibit A.

On November 2, 2009, the evening before the scheduled adoption hearing, Judge Deschamps' clerk informed the Petitioners' counsel that the District Court would not grant the adoption. At the hearing the next day, November 3, 2009, Judge Deschamps further expressed his disapproval of the statutory law, and determined that the 1997 Act violates the constitutional due process rights of the unidentified birth father. The District Court's determination shifted the burden to preserve the birth father's right to notice from the unknown father to the birth mother and the Petitioners.

... [T]he Court is of the view that even though there is a statutory scheme that purports to make this process unnecessary, that the constitutional rights of the biological father are things that the Court is concerned about and, I think, may trump the statute.

And therefore, Mr. Newcomer, I am going to require that you attempt to give notice to the natural father.

(Trans., Nov. 3, 2009, 22:19 – 23:11, Exhibit B)

On November 6, 2009 the District Court issued its *Order* requiring that the Petitioners personally serve the unidentified birth father with notice of the adoption proceedings. Exhibit C.

The Petitioners requested that the District Court reconsider its November 6th *Order* and submitted Petitioner's counsel's *Affidavit* in support of the request.

Counsel's *Affidavit* alleged, based upon further conversations with the birth mother, that there may be two potential birth fathers, "J.D." and "Bobby," and that the birth mother was unable to further identify either person. The birth mother was introduced to both men at different parties when the birth mother was in an inebriated state. The birth mother did not have further contact with either individual after this time. Counsel concluded that the birth mother was not able to identify either person with sufficient details to allow the personal service that the District Court required. *Affidavit in Support of Motion for Order Allowing Service by Publication*, Nov. 18, 2009, p. 1, l. 21 through p. 2, l. 19., Exhibit E.

Judge Deschamps denied the Petitioner's request for reconsideration of his personal service order and ignored the practical problem of securing personal service upon individuals known only by nickname. Judge Deschamps found that, "[T]he Putative Father Registry fails to adequately safeguard the interests and due process rights of Montana's birth fathers who were unaware, by no fault of their own, of the pregnancy and birth." *Order*, Dec. 1, 2009, p. 2, l. 21 through p. 3, l. 1, Exhibit D. Judge Deschamps would compel the birth mother to divulge the complete identity of the possible birth fathers rather than require the potential father to register as a putative father. *Trans.*, Nov. 3, 2009, 25:2-10, Exhibit B.

Procedural Background

This is a direct placement adoption, allowed by Mont. Code Ann. § 42-2-

401(1).

There is a presumed father who denied paternity as allowed by Mont. Code Ann. § 42-2-401(2). Notice to the presumed father is not required. Mont. Code Ann. § 42-2-422(2).

Notice is required to be given to a putative father who has complied with the putative father registry. Mont. Code Ann. § 42-2-605(1)(a). The 1997 Legislature considered the obligations and burdens upon the birth mother in placing this limited duty to register with the father. Mont. Code Ann. § 42-1-108.

Constitutional protection, including notice, is afforded to the birth father if:

- he has timely and consistently provided financial support;
- he has complied with the requirements of the putative father registry; and
- he has demonstrated the establishment of a substantial relationship with the child.

Mont. Code Ann. § 42-1-108(2)(f). Such protection of the father's interest is lost by the failure to take these steps. Mont. Code Ann. § 42-1-108(3).

The 1997 Montana Adoption Act creates a single path for fathers to preserve parental rights arising from casual sex, the Putative Father Registry. Where the unidentified father has not registered as a putative father, the District Court's extraordinary requirement for personal service of the father defeats the protections the Legislature intended to confer upon the child, the birth mother and the prospective adoptive parents.

Procedurally, the Petitioners and the child are stuck by the District Court's

November 6th and December 1st *Orders*. In order to go forward with the adoption the Petitioners must unnecessarily violate the birth mother's privacy right provided by Mont. Code Ann. §§ 42-1-111 and 42-1-108(2)(c), assuming that coercion of the birth mother will result in a further identification of potential birth fathers now identified only by nicknames.

ARGUMENT

I. A Writ of Supervisory Control Is Warranted In This Case

This Court has general supervisory control over all other courts. Mont. Const. Art. VII, § 2(2). Supervisory control is an extraordinary remedy that this Court exercises only in extraordinary circumstances. *J.C. v. Eleventh Judicial Dist. Court*, 2008 MT 358, ¶ 12, 346 Mont. 357, 360, 197 P.3d 907, 909 (citing *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 16, 337 Mont. 488, ¶ 16, 162 P.3d 121, ¶ 16). This Court exercises supervisory control on a case-by-case basis and only when,

[U]rgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

- a. The other court is proceeding under a mistake of law and is causing a gross injustice;
- b. Constitutional issues of state-wide importance are involved;
- c. The other court has granted or denied a motion for substitution of a judge in a criminal case.

M.R.App.P. 14(3).

Supervisory control is appropriate because the District Court incorrectly

ruled that the 1997 Montana Adoption Act, specifically the notice provisions of the Putative Father Registry, violates the constitutional due process rights of unidentified potential fathers who have not registered as putative fathers. This ruling is of statewide importance because the Putative Father Registry is fundamental to the operation of the 1997 Montana Adoption Act. The District Court's ruling ignores the 1997 Legislature's balancing of constitutional interests between the birth father, birth mother, child, and adoptive parents. The District Court's ruling ignores the presumption of statutory constitutionality. Finally, the District Court should not be allowed to impose special procedural rules based upon its personal bias.

The status of the child, adoptive parents, and birth parents are without resolution until the parental rights of both parents are terminated and those of the adoptive parents are established. The normal appeal process is inadequate because the District Court's personal service order cannot be resolved without violating the birth mother's privacy right and still may be impossible to achieve if the potential fathers cannot be identified by her beyond the nicknames she supplied. The Petitioners are stuck, and every interest is in limbo.

II. Placing the Burden upon a Birth Father to Preserve His Right to Notice Does Not Violate His Constitutional Right to Due Process

STANDARD OF REVIEW

Statutes enjoy a presumption of constitutionality and the person challenging

a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt. The constitutionality of a statute is a question of law. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 170, 174 P.3d 469, 471. This Court exercises plenary review of questions of constitutional law, and reviews a district court's application of the Constitution to determine if it is correct. *Knudson*, ¶ 12, 170, 471. *In the Matter Youth in Cascade County No. CDJ 08-0133(A)*, 2009 MT 355, ¶9, 353 Mont. 194, 197, 219 P.3d 1255, 1258.

A. Montana's Putative Father Registry is Constitutional

The 1997 Montana Legislature substantially changed the statutory scheme for adoptions with the Montana Adoption Act, Mont. Code Ann. § 42-1-101, *et seq.* At issue is the Act's shift of the responsibility to preserve a potential birth father's parental rights from the state, birth mother, adoption agency or prospective adoptive parent, to the birth father. The way a birth father without an ongoing relationship with the birth mother preserves his potential parental rights arising from a casual sexual encounter is to register the encounter with the Putative Father Registry maintained by the Department of Public Health and Human Services.

The 1997 Legislature's intent to balance the competing interests of the child, the child's birth parents, prospective adoptive parents, legal parents and guardians, and the state appears at Mont. Code Ann. § 42-1-108:

Rights and responsibilities of parties in adoption proceedings. (1)

The legislature finds that the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining the necessary constitutional protection and appropriate processes.

(2) The legislature finds that:

(a) every child deserves to be raised by a family in which support and care are promptly provided by one or more parents in a nurturing environment on a regular and ongoing basis;

(b) the state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

(c) an unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, has the right to make timely and appropriate decisions regarding the mother's future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement;

(d) adoptive children have a right to permanence and stability in adoptive placements;

(e) adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(f) a birth father who is not married to the child's mother has the primary responsibility to protect the father's rights. The father's inchoate interest in the child requires constitutional protection only when the father has demonstrated a timely commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. The state has a compelling interest in requiring a birth father to demonstrate that commitment by:

(i) timely and consistently providing financial support;

(ii) complying with the requirements of the putative father registry; and

(iii) demonstrating the establishment of a substantial relationship with the child as described in 42-2-610.

(3) If a birth father who is not married to the child's mother fails to grasp the opportunities that are available to the father to establish a relationship with the child, the father's parental rights will be lost entirely by

the failure to timely exercise it or by the failure to comply with the available legal steps to substantiate the parental interest.

This statement of intent follows the language used in the Syllabus to the United States Supreme Court decision in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 2986 (1983). In *Lehr*, the Supreme Court upheld the termination of the father's parental rights because the father had never established a substantial relationship with his child and he could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to the putative father registry. The *Lehr* Court ruled that the requirement that a father register with the putative father registry did not violate the father's constitutional right to due process.

Judge Deschamps' December 1, 2009 *Order* rejects *Lehr's* conclusion that the putative father registry affords due process. But the facts of the *Lehr* case drive the dissenting conclusion that the putative father was denied due process. *Lehr* is a step parent adoption case. *Lehr* at page 250, 2987. The birth father lived with the birth mother for two years, until the child was born. *Lehr* at page 252, 2988. The birth father visited the birth mother and child in the hospital every day during the birth mother's confinement. When the birth mother disappeared after she was discharged from the hospital following the child's birth, the birth father searched for the birth mother and child, located them through a private detective. The birth father then visited with the child when the birth mother permitted. The birth father

eventually brought a paternity action. *Lehr* at pages 252, 268-9, 2988-9, 2997.

The contention of the *Lehr* dissent is that the birth father took action to establish his relationship, but did not file with the putative father registry. The *Lehr* majority does not credit the birth father for his other acts, and focuses only on the failure to file with the putative father registry. Apparently the minority would credit the birth father with his other acts to establish putative father status and refuse to apply the putative father registration requirement strictly under these circumstances.

Here, the birth mother met the birth father at a party. *Affidavit* ¶¶ 6-8, Exhibit E. She does not know either potential father's full name and can only provide their nicknames. The relationship was clearly casual and brief. The potential fathers probably have no knowledge of the birth mother's pregnancy or of the resulting child. None of the factors that trouble the *Lehr* dissenters are present in this case. This is just the situation that the Putative Father Registry is intended to address.

B. Birth father's duty to register

Mont. Code. Anno. § 42-1-110, illustrates the shift of the responsibility for notice to the birth father,

Presumed knowledge that child may be adopted without notice. A birth father who is not married to the mother of the child is presumed to know that the child may be adopted without the father's consent and that the father is required to comply with the provisions of this title and manifest a

commitment to the father's parental responsibilities.

Mont. Code. Anno. § 42-2-201(2)(a), partially defines a “putative father” as an individual who may be a child’s birth father but:

- (i) who is not married to the child’s mother on or before the child is born; or
- (ii) has not established his paternity before the filing of a petition for termination of parental rights for purposes of adoption.

The purpose of the putative father registry is to assist a putative father to assert a parental interest in a child. Mont. Code Anno. § 42-2-203. The Legislature reiterated the presumption of knowledge to birth fathers when it shifted the duty to ensure notice from others to the birth father. Mont. Code Anno. § 42-2-204. Throughout the 1997 Act notice to the birth father is conditioned upon his registration with the Putative Father Registry.

A birth father may register before a child’s birth and even if he does not have actual knowledge that the birth mother is pregnant or if the pregnancy will continue through to birth. Mont. Code Ann. § 42-2-206. A birth father who registers with the Putative Father Registry will receive notice of adoption or termination proceeding because § 42-2-217 requires an affidavit from the Registry before the district court can issue an order terminating parental rights.

It is the birth father’s responsibility to seek notice of termination or adoption proceedings through the Putative Father Registry. Mont. Code Anno. § 42-2-230 (1) and (2), state:

Responsibility of each party to protect interests -- putative fathers -- fraud no defense. (1) The legislature finds no practical way to remove all risk of fraud or misrepresentation in adoption proceedings and has provided protection of a putative father's rights. In balancing the rights and interests of the state and of all parties affected by fraud, specifically the child, the adoptive parents, and the putative father, the legislature determines that the putative father is in the best position to prevent or ameliorate the effects of fraud and that, therefore, the burden of establishing fraud against the putative father by clear and convincing evidence must be born by the putative father.

(2) Each parent of a child conceived or born outside of marriage to the other parent is responsible for that parent's own actions and assertion of their parental rights **notwithstanding any action, statement, or omission of the other parent or third parties.** [Emphasis added.]

C. Birth mother's right to privacy

There is no requirement in the 1997 Act that the birth mother name the birth father, if known. Mont. Code Ann. § 42-4-102(2) requires the birth mother, as the placing parent, to identify and provide information on the location of any other legal parent or guardian of the child and any other person required to receive notice under § 42-2-605, including:

- (a) any current spouse;
- (b) any spouse who is the other birth parent and to whom the parent was married at the probable time of conception or birth of the child; and
- (c) any adoptive parent.

But, the 1997 Act recognizes an unmarried birth mother's right to privacy not only in § 42-1-108(2)(c), MCA, but also in § 42-1-111, MCA, where the unmarried birth mother is "encouraged," but not required, to provide known information about the birth father.

Requiring an unmarried birth mother to identify the birth father, assuming that she can, violates the privacy afforded the birth mother under the Act in order to address the birth father's failure to comply with his registration responsibility. This birth mother should be afforded the same privacy rights as an unmarried single mother because her estranged husband denied paternity.

The requirement that the birth father register to receive notice is no more burdensome than requiring the birth mother to name the birth father. Under the 1997 Act, the birth mother is not required to identify the birth father, but the birth father is required to register to receive notice. The Court should not require the birth mother to name the birth father, something the Act does not require, in order to remediate the birth father's failure to register as a putative father.

Conclusion

The District Court's cursory dismissal of the 1997 Legislature's careful balancing of the adoption parties' rights and duties shifts the burden of preserving the right to notice of termination of parental rights from an unnamed potential father back to the other parties. The District Court expects the birth mother to give up her privacy interest in favor of the unidentified father so that he may be located and served. If the birth mother refuses to identify the birth father, then presumably the Petitioners' alternative would be to publish sufficient details about the child's birth to establish service by publication. Either way the action will require a

violation of the birth mother's privacy. Meanwhile, the child and adoptive parents' rights to a stable home and permanence of placement are at risk.

The 1997 Act created a clear path to establish putative father status through the Putative Father Registry and to preserve parental rights for fathers that actually have an interest in becoming parents. The Putative Father Registry Report establishes that there are no such persons in this case. The Court should not require the birth mother or prospective adoptive parents to identify and give notice to a person who does not qualify as a putative or presumed father, and is not entitled to notice for any other reason except the District Court's disagreement with the 1997 Legislature's findings and constitutional allocation of rights and responsibilities of the parties to an adoption.

Relief Requested

The Petitioners request that this Court vacate the District Court's order requiring service of notice upon potential birth fathers, known only by their nicknames, who did not register with the Putative Father Registry, and have not attempted to establish a relationship with, or to support, the child. This Court should direct the District Court to determine that the Petitioners' adoption petition is sufficient: to approve the birth mother's relinquishment; to terminate the birth mother and unknown birth father's parental rights; and, to establish the relationship of parent and child between the Petitioners and the child.

Dated July 19, 2010.

P. Mars Scott Law Office

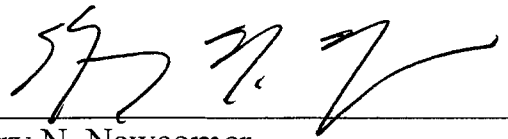
By: 

Kerry N. Newcomer

Petitioners' attorneys

Certificate of Compliance

I certify that this Petition for Writ of Supervisory Control is printed in proportionally spaced Times New Roman font of 14 points; is double spaced; and that the word count is less than 4,000, as calculated by Microsoft Word 2007, excluding the title page, Table of Contents, Table of Authorities, Table of Exhibits and certificates.


Kerry N. Newcomer

Certificate of Service

I hereby certify that on July 19, 2010, a copy of this Petition for Writ of Supervisory Control and Exhibits was personally delivered to the chambers of:

Hon. Robert L. Deschamps, III
District Judge
Fourth Judicial District, Dept. 2
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802

and was served by US Mail, first class, postage paid to:

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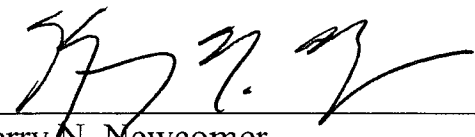

Kerry N. Newcomer

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